The Law as They Found It: Disentangling Gender-Based Affirmative Action Programs from *Croson*

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City of Richmond v J.A. Croson Co.[1] was the first Supreme Court case in twelve years in which a majority agreed on a single standard of equal protection review for a race-specific preference program. The Court employed the strict scrutiny standard and signalled a departure from the prelapsarian era when all affirmative action programs were accorded constitutional latitude.[2] But the import of *Croson* is not limited to the invocation of strict scrutiny: it was the first time that a majority required a stringent factual record of explicit past discrimination to justify an affirmative action program.[3]

Croson has had a mesmeric effect on conservative judges; though the decision was specifically directed at programs for racial minorities, these judges have interpreted the opinion to require the strict scrutiny standard for gender-based preference programs.[4] Other courts have applied the law as they found it: they appropriately continue to use the traditional intermediate scrutiny test.[5] Two courts have been more creative, and more damaging. They applied intermediate scrutiny but required an exacting *Croson*-style factual predicate to justify gender-based affirmative action programs—consequently invalidating programs that would have sur-

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[1] 488 US 469 (1989).

[2] Id at 493-95.

[3] Id at 497-511.

[4] See *Conlin v Blanchard*, 890 F2d 811, 816 (6th Cir 1989); *Cone Corp. v Hillsborough County*, 908 F2d 908, 913-17 (11th Cir 1990); *American Subcontractors Ass'n v City of Atlanta*, 259 Ga 14, 16, 376 SE2d 662, 664 (1989).

[5] See *Milwaukee County Pavers Ass'n v Fiedler*, 922 F2d 419, 422 (7th Cir 1991) (dicta), cert denied, 111 S Ct 2261 (1991); *Coral Construction Co. v King County*, 941 F2d 910, 930-31 (9th Cir 1991), cert denied, 112 S Ct 875 (1992); *Clark v Arizona Interscholastic Ass'n*, 886 F2d 1191, 1193-94 (9th Cir 1989); *Main Line Paving Co. v Board of Education*, 725 F Supp 1349, 1362-63 (E D Pa 1989).

vived constitutional review under the traditionally less exacting standard.[6]

This Comment examines the propriety of these interpretations. It addresses two issues: first, whether the intermediate standard of equal protection review remains appropriate for gender-specific affirmative action programs enacted by state and local governments; and second, assuming this standard remains proper, whether the exacting factual requirements propounded by *Croson* affect the traditional mid-level standard.

Section I provides a thematic discussion of the cases that define intermediate and strict scrutiny and their application to affirmative action programs. It then examines *Croson* and argues that the Court announced a change in its conception of the rights protected by the Equal Protection Clause. Individual rights, irrespective of the relative advantage enjoyed by the group from which a person hails, are now the focus of the Fourteenth Amendment. *Croson* is important for a less frequently discussed reason: it was the first time that a majority of the Court demanded a stiff factual predicate to justify a racial preference program.

Section II explores the difficulties raised by *Croson* as it relates to gender-based programs. Part A argues that the intermediate standard remains appropriate to review affirmative action programs for women because *Croson* never addressed gender classifications or the intermediate standard. The Court's emphasis on the equal protection of individual rather than class rights requires that all gender classifications, whether invidious or remedial, receive philosophically consistent treatment. One standard, intermediate scrutiny, must apply to all gender classifications.

Part B of Section II examines the propensity some courts have shown toward increasing the factual requirements necessary to support gender-based programs. It argues that grafting a *Croson*-style factual requirement onto traditional intermediate scrutiny is inappropriate because it disingenuously transforms the intermediate standard into strict scrutiny. The Comment contends that pragmatic and theoretical concerns require a careful delimitation between race-specific affirmative action programs, which are subject to strict scrutiny and a stringent factual predicate, and affirmative action programs that benefit women, which courts must review under the traditional intermediate scrutiny standard without exigent factual requirements.

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[6] *Lamprecht v FCC*, 958 F2d 382, 398 n 9 (DC Cir 1992); *Contractors Ass'n of Eastern Pennsylvania, Inc. v City of Philadelphia*, 735 F Supp 1274, 1301-07 (E D Pa 1990).

I. Equal Protection Challenges to Affirmative Action Programs

The Supreme Court established a three-tiered system of review to ensure the Fourteenth Amendment guarantee that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[7] The application of these standards to invidious classifications is undisputed, but affirmative action programs have created philosophical and practical inconsistencies in the administration of the Equal Protection Clause. Although the Court has professed an unwillingness to alter, at least nominally, the three tiers of scrutiny,[8] the standards continue to evolve. Part A of this Section examines the intermediate standard of review and the Court cases that define it.[9] Part B provides an overview of pre-*Croson* cases that deal with strict scrutiny and racial classifications. Part C explores *Croson*, focusing on its theoretical conception of the rights guaranteed by the Equal Protection Clause.

A. Intermediate Scrutiny and Gender-Based Preference Programs

1. The development of the intermediate standard.

The Court did not always believe that gender classifications demanded intermediate scrutiny under the Equal Protection Clause. In *Reed v Reed*,[10] the Court considered gender discrimination in the context of an Idaho statute that granted preference to men over women when both were eligible to administer an estate. The Court held that the statute violated the Equal Protection Clause because it failed the minimal scrutiny or "rational basis" test.[11] This standard, which had been the keystone of equal protection review since the early 1940s, requires that a classification bear "a rational relationship to a state objective that is sought to be advanced . . . ."[12] The Court had been using the minimal scrutiny standard for all equal protection cases except those that concerned

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[7] US Const, Amend XIV, § 1.

[8] *Croson*, 488 US at 518-19 (Kennedy concurring).

[9] This Section is not an exhaustive analysis of *Croson* and the cases that preceded it. For such a review, see Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 Mich L Rev 524 (1987); Michael Rosenfeld, *Affirmative Action and Justice* (Yale, 1991); Comment, City of Richmond v. J. A. Croson Co.*: Charting a Course Through the Supreme Court's Affirmative Action Decisions*, 17 Hastings Const L Q 699 (1990); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv L Rev 78 (1986).

[10] 404 US 71, 72-73 (1971).

[11] Id at 76-77.

[12] Id at 76.

race, national origin, or a fundamental constitutional right. Those classifications demanded strict scrutiny.[13]

Dissatisfied with the protection accorded women by the rational basis test but unconvinced that gender classifications were dangerous enough to warrant strict scrutiny, the *Reed* Court began a trend that subtly stiffened minimal scrutiny when reviewing gender classifications, though it claimed to apply the traditional standard.[14] Then, in *Craig v Boren*,[15] the Court scrapped the pretense of minimal scrutiny for gender classifications and established an intermediate standard of review. This two-pronged standard required that "classifications by gender . . . [1] serve important governmental objectives and . . . [2] be substantially related to the achievement of those objectives."[16]

Craig was portentous for another reason: the Court applied the intermediate standard to a statute that prohibited males under the age of 21 from drinking beer while it allowed women over 18 to drink, establishing that men too could be the victims of a discriminatory classification.[17] Intermediate scrutiny thus became relevant even where the group adversely affected is more powerful, as is the case when a gender classification is designed to benefit a disadvantaged group. The Court confirmed this principle in *Orr v Orr*,[18] its first case involving a gender-based preference program. There, it extended the application of the intermediate scrutiny standard to strike down several Alabama statutes that imposed alimony requirements on husbands but not wives.[19]

Although these cases strongly suggest that the Court believes affirmative action programs for women must be reviewed using intermediate scrutiny, in *Croson*'s wake courts have split over the application of strict or intermediate scrutiny to gender-based programs.[20] This division hazily reflects perceptions of the Court's ambivalence about the multi-tiered system, though the Court's unease

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[13] See *McLaughlin v Florida*, 379 US 184, 191-92 (1964) (race); *Oyama v California*, 332 US 633, 646 (1948) (national origin); *Shapiro v Thompson*, 394 US 618, 634 (1969) (fundamental right).

[14] See *Schlesinger v Ballard*, 419 US 498, 507-10 (1975); *Weinberger v Wiesenfeld*, 420 US 636, 645-48 (1975); *Stanton v Stanton*, 421 US 7, 13-17 (1975); *Kahn v Shevin*, 416 US 351, 353-56 (1974).

[15] 429 US 190 (1976).

[16] Id at 197.

[17] See id at 199-204.

[18] 440 US 268 (1979).

[19] Id at 279-80.

[20] See text accompanying notes 4-6 for a breakdown of the standards of review adopted by different lower courts.

stems more from doubts about the three-tiered system as a practical approach than from the theoretical justification for the intermediate standard.[21] Despite the misperceptions, the jurisprudence is unclouded; the Court's decisions affirm the continued viability of the intermediate standard.

2. The factual predicate.

If there is a residual dispute over the appropriate standard of scrutiny, the nature of the factual findings necessary to support a gender-based classification under either prong of the intermediate standard is even more ambiguous.[22] The Burger Court required an undemanding factual predicate to justify an "important" government objective. "[A]rchaic and overbroad generalizations"—which meant stereotypes such as women were meant to be housewives—could not justify a gender classification.[23] Beyond that, the factual requirements were largely unspecified. As long as a gender classification realistically reflected legitimate differences between the sexes and represented a reasonable means of solving the targeted problem, it would survive intermediate review.[24] In particular, a gender-based preference program would withstand this scrutiny if implemented as an honest and plausible attempt to reduce "the disparity in economic condition between men and women caused by the long history of discrimination against women."[25]

Subsequently, the Court added a new phrase to the intermediate scrutiny standard. In *Mississippi University for Women v Ho-*

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[21] Justice Rehnquist disparaged the use of three levels of scrutiny. He observed, "I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved—so as to counsel weightily against the insertion of still another 'standard' between those two." *Craig*, 429 US at 220-21 (Rehnquist dissenting). Justice Stevens argued for a single standard of equal protection review. Id at 212 (Stevens concurring). Justice Marshall expressed an initial reluctance toward the system of multi-level review; see *Massachusetts Board of Retirement v Murgia*, 427 US 307, 318-21 (1976) (Marshall dissenting) and *Marshall v United States*, 414 US 417, 432-33 (1974) (Marshall dissenting), but subsequently embraced it, *Plyler v Doe*, 457 US 202, 231 (1982) (Marshall concurring).

[22] The dispute over factual findings also arises in the context of strict scrutiny and race-specific classifications. See text accompanying notes 35-46.

[23] *Schlesinger*, 419 US at 508.

[24] *Michael M. v Sonoma County Superior Court*, 450 US 464, 468-75 (1981). Similarly, "substantially related" did not require a showing that no other solution was possible. Id at 473-75.

[25] *Califano v Webster*, 430 US 313, 317 (1977) (upholding a gender-based classification).

gan,[26] Justice O'Connor required that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." Heeding the new phrase but ignoring the fact that the Court did not revise the factual requirements of the intermediate standard, several courts have demanded increasingly stringent factual demonstrations to support a gender-based classification—an exacting requirement influenced by the Court's decisions in cases concerning race but unjustified by the law concerning gender.[27] Although the standard remains loosely defined, the principles are straightforward: the factual requirement must be less stringent for intermediate than for strict scrutiny.

B. Strict Scrutiny and Race-Specific Preference Programs

1. The application of strict scrutiny to a remedial classification.

Recent equal protection doctrine for affirmative action cases has evolved almost exclusively in the area of race-specific programs. These cases, all plurality opinions, have applied strict scrutiny to racial preference programs enacted by State or local government, and they have unjustifiably influenced the equal protection review of affirmative action programs for women.

University of California Regents v Bakke[28] signalled the current era of affirmative action jurisprudence. A medical school adopted an admissions policy that accorded sixteen spots to minority applicants in each entering class of one hundred students.[29] Five justices held the policy invalid, but four found that the plan violated Title VII of the 1964 Civil Rights Act, and did not consider the constitutional issue.[30] Only the fifth, Justice Powell, stated that the plan violated the Equal Protection Clause.[31] He wrote that all classifications by race, whether intended to help or harm, were subject to strict scrutiny.[32]

Justice Brennan, joined by Justices Blackmun, Marshall, and White, dissented from Powell's conclusion that strict scrutiny was appropriate to judge racial and ethnic distinctions regardless of the

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[26] 458 US 718, 724 (1982). See also *Kirchberg v Feenstra*, 450 US 455, 461 (1981).

[27] See Section II.B.

[28] 438 US 265 (1978).

[29] Id at 275 (Powell writing separately).

[30] Id at 421 (Stevens concurring in the judgment in part and dissenting in part).

[31] Id at 320 (Powell writing separately).

[32] Id at 291.

purpose behind the classification.[33] These justices would apply a less stringent standard—intermediate scrutiny—if the purpose of the classification were remedial.[34]

2. The factual predicate for strict scrutiny.

Justice Brennan's dissenting opinion in *Bakke* prefaced the controversy over the factual predicate necessary to sustain an affirmative action program.[35] Affirmative action programs, Brennan argued, may be justified by broad historical discrimination and statistics drawn from the country as a whole.[36] Justice Powell disagreed, stating that strict judicial, legislative, or administrative findings of constitutional or statutory violations must exist.[37] He acknowledged that diversity was a "compelling" interest of an admissions program,[38] but nevertheless concluded that an admissions committee may treat race as only one factor in a variegated set of qualifications and not as a basis for entry into a set-aside program that reserves admission places for racial minorities.[39]

The Court in *Wygant v Jackson Board of Education*[40] held unconstitutional an affirmative action program that favored minorities when employees were being dismissed. Justice Powell, writing for the plurality, stated that any racial classification, benign or invidious, was inherently suspect and must survive strict scrutiny.[41] Justice Powell required that the program remedy specific instances of discrimination. Broad societal discrimination could not justify a state or local affirmative action program.[42] The plurality derided historical grievances, held sufficient to justify gender-based affirm-

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[33] Id at 357-59 (Brennan, White, Marshall, and Blackmun concurring in the judgment in part and dissenting in part).

[34] Id at 359-62.

[35] This dispute had already surfaced in the context of intermediate scrutiny and gender-based classifications. See text accompanying notes 22-29.

[36] *Bakke*, 438 US at 369-73 (Brennan, White, Marshall, and Blackmun concurring in the judgment in part and dissenting in part). Statistics such as "the gap between the proportion of Negroes in medicine and their proportion in the population" should be sufficient to justify a racial classification. Id at 370.

[37] Id at 307-09 (Powell writing separately).

[38] Id at 315.

[39] Id at 318-19. Justice Powell's proposal for an admissions policy that includes race as one of many factors may not be practicable, for when an admissions officer considers race, she might effectively intend to admit a certain number of minority applicants, weighting race heavily in their favor. Once that number of minorities has been admitted, race may diminish as a factor that increases a candidate's chances for admission.

[40] 476 US 267 (1986) (plurality opinion).

[41] Id at 273.

[42] Id at 276.

ative action programs, as too abstract to support race-specific programs.[43]

Justice O'Connor wrote a portentous concurrence acknowledging that strict scrutiny was the proper standard to review benign racial classifications,[44] but advocating a relaxation of the Court's previous requirement that the governmental body make specific findings of discrimination. She demanded only substantial evidence of discrimination because, among other consequences, specific findings might subject the government to liability, and therefore deter public employers from enacting affirmative action programs altogether.[45] Justice O'Connor's opinion hinged on her belief that the layoff provision was not narrowly tailored to achieve its remedial purpose.[46]

3. The distinction between congressional and local affirmative action programs.

The Court gives much greater deference to congressional affirmative action programs than to those enacted by state and local governments. In *Fullilove v Klutznick*,[47] the Court upheld a federal public works program that granted a ten percent set-aside for minority contractors. Although it did not state which standard of review it was applying, the Court acknowledged that where Congress rather than local government acts to redress discrimination, it will not critically review the factual record for specific instances of past discrimination.[48] Consequently, the Court will allow Congress to enact a broader, more diffused affirmative action program.[49] Congress, unlike local governments, has broad remedial powers. With minimal judicial interference, it may interpret facts, make assumptions, and act on them.

A decade later, the Court again demonstrated this deference by applying intermediate scrutiny to a federal race-specific affirm-

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[43] See id at 274-78.

[44] Id at 284-86 (O'Connor concurring).

[45] See id at 290-91 (O'Connor concurring). If the government must admit guilt for discriminating against specific individuals or companies, those victims will file lawsuits requesting damages. See Sullivan, 100 Harv L Rev at 92 (cited in note 9).

[46] 476 US at 294 (O'Connor concurring).

[47] 448 US 448, 492 (1980).

[48] Id at 472 ("we . . . approach our task with appropriate deference to the Congress . . ."); id at 485 ("it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities").

[49] See id at 472.

ative action program.[50] In *Metro Broadcasting v FCC*, Justice Brennan wrote that "race-conscious classifications adopted by Congress are subject to a different standard than such classifications prescribed by state and local governments."[51] With the resignation of Justice Brennan, and the fact that in dissent Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Scalia, believed that strict scrutiny should apply to all racial classifications, it is unlikely that the Court will continue to apply a lower standard of review to congressional classifications. More likely, the Court will show deference to Congress by an uncritical review of the congressional findings of fact.

C. *City of Richmond v J. A. Croson Co.*: Reimagining Affirmative Action

Croson made two important modifications to equal protection doctrine. It mandated that the consistent protection of individual rights requires the application of strict scrutiny to any racial classification, regardless of the legislation's purpose. It also reiterated, for the first time by a majority, the exacting factual predicate necessary to justify any racial classification.

The Richmond City Council, which was more than one-half black, passed a Minority Business Utilization Plan that required prime contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBEs)—companies of which at least fifty-one percent is owned by minorities.[52] The Council defined minorities as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."[53] The plan did not limit the area from which a minority-owned business could apply; apparently, a minority business from hundreds of miles away, where it endured no discrimination, could apply for a Richmond city contract and benefit from the affirmative action program.[54] The Council meant the Richmond plan to be "remedial" and enacted it "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[55] The Court applied strict

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[50] *Metro Broadcasting v FCC*, 110 S Ct 2997, 3026 (1990).

[51] Id at 3009.

[52] *City of Richmond v J.A. Croson Co.*, 488 US 469, 477-78 (1989).

[53] Id at 478.

[54] Id.

[55] Id, quoting Richmond, Va City Code § 12-158(a) (1985).

scrutiny and required an exacting factual predicate.[56] It held the plan unconstitutional.

1. Strict scrutiny of a racial preference program.

The Court invoked strict scrutiny to review a locally-enacted benign racial classification because it reconceived the rights guaranteed by the Equal Protection Clause.[57] The opinion stressed that the Fourteenth Amendment guarantees individual rights.[58] It makes no qualifying reference to class, race or gender. Justice O'Connor specifically agreed with the view of Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[59] Justice Scalia went further. In his concurrence he stated flatly that "[o]ur Constitution is colorblind";[60] whatever a person's race, she has "a constitutional right" to be considered on "[her] individual merits in a racially neutral manner."[61] This, Justice Scalia exhorted, is a fundamental "American principle" from which the Court must no longer depart.[62]

The Court applied strict scrutiny to a race-based affirmative action program not merely because it had become increasingly mistrustful of the uses of affirmative action programs, but because it had developed a conception of the Equal Protection Clause premised on the guarantee of individual rights. There is, then, a strong majority on the Court that believes that classifications, whether invidious or benign, must be judged consistently.[63]

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[56] Id at 493-511.

[57] Id at 493-95. The Court was also motivated by skepticism concerning the benevolence of affirmative action in all cases. Id at 493-94.

[58] Id at 493. When Justice Marshall disparaged the majority opinion as a "deliberate and giant step backward in this Court's affirmative action jurisprudence," id at 529 (Marshall dissenting), an indication that the Court "regard[ed] racial discrimination as largely a phenomenon of the past," id at 552, he was essentially objecting to the dismissal of a collective conception of equal rights.

[59] Id at 494, quoting *Bakke*, 438 US at 289-90.

[60] Id at 521 (Scalia concurring), quoting *Plessy v Ferguson*, 163 US 537, 559 (1896).

[61] Id at 527, quoting *DeFunis v Odegaard*, 416 US 312, 337 (1974) (Douglas dissenting).

[62] Id.

[63] Justice O'Connor ended the majority opinion by noting the difficulty of determining whether a classification was benign or discriminatory. Id at 510-11. The Richmond program, she suggested, may not be affirmative action at all: Richmond's population was fifty percent black, and its City Council consisted of nine seats, five held by blacks. Id at 495. Here a majority group passed a statute to advantage itself and did not, as in the usual case of affirmative action, establish a program to its own disadvantage. Id at 495-96.

2. The factual predicate.

The decision to apply strict scrutiny was attacked as a sign that the Court was no longer concerned with civil rights and, implicitly, equality beyond a theoretical and detached level.[64] The preoccupation with strict scrutiny, however, ignores another aspect of the decision that also compromised the viability of affirmative action programs. The Court demanded comprehensive documentation of specific instances of past discrimination to justify a remedial preference program.[65] It held that the purpose of a race-based classification could be compelling only if it were supported by a convincing array of specific facts.[66] Even if the interest were compelling, the classification must be narrowly tailored to be specifically remedial.[67]

Although the Court has never allowed past societal discrimination to validate race-specific affirmative action by a state or local government, *Croson* further limited the proof acceptable to justify a remedial program reviewed under strict scrutiny. A comparison between the number of prime contracts awarded to minority firms and the minority population in Richmond was insufficient, for it did not establish that minority-owned subcontractors had been discriminated against.[68] Justice O'Connor mused that "[b]lacks may be disproportionately attracted to industries other than construction."[69] No direct evidence indicated that Richmond had discriminated along racial lines in awarding contracts or that prime contractors had discriminated against minority subcontractors.[70]

In order to establish a compelling government interest, Richmond had to prove that the city itself had engaged in discriminatory practices,[71] or that "contractors were systematically excluding minority businesses from subcontracting opportunities."[72] Minority subcontractors, and not blacks in the population at large, must be the direct victims of discrimination by Richmond's construction

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[64] *Croson*, 488 US at 539-40 (Marshall dissenting).

[65] The Court retained the distinction between affirmative action programs created by Congress and those created by local governments. Although Congress "need not make specific findings of discrimination to engage in race-conscious relief," Richmond must. Id at 489-91.

[66] Id at 505.

[67] Id at 507-08.

[68] Id at 501.

[69] Id at 503.

[70] Id at 480.

[71] Id at 510.

[72] Id at 509.

contracts division. As the Court admitted, a closely-tailored racial preference was warranted only in an "extreme case."[73] Extreme cases, however, would essentially be personal ones, where a specific individual or business could prove discrimination against her or the firm.[74]

The second aspect of the factual requirement in *Croson* concerned the scope of the statute: whether it was narrowly tailored to redress a specific past wrong.[75] Justice O'Connor held that the Richmond plan was not tailored narrowly enough to further its purpose—even if that purpose had been compelling—because Richmond had failed to consider "the use of race-neutral means to increase minority business participation in city contracting."[76] A strict racial quota must be a final attempt to redress a recalcitrant situation; the government must have attempted or at least seriously considered other solutions.[77] The thirty percent figure was not tailored "to any goal, except perhaps outright racial balancing."[78] Since the Richmond program included in its definition of a "Minority-Owned Business" those owned by Eskimo or Aleut citizens—groups not represented in Richmond—the statute could not have been founded on adequate evidence of discrimination in the Richmond construction market.[79]

Justice Marshall did not merely disagree with the decision to apply strict scrutiny; he realized that the Court also demanded a new factual predicate that would be extremely difficult for any affirmative action program to satisfy. He stated that Richmond had compiled sufficient evidence to justify the set-aside program under either intermediate or strict scrutiny, and that the city was not relying on abstract societal discrimination.[80] Justice Marshall argued that "to suggest that the facts on which Richmond has relied do not provide a sound basis for its finding of past racial discrimination simply blinks credibility."[81]

After *Croson* and its predecessors, then, a remedial racial classification will survive strict review only if the government entity granting the preference previously discriminated in the relevant in-

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[73] Id.

[74] Id.

[75] See id at 507-08.

[76] Id at 507.

[77] Id.

[78] Id.

[79] Id at 506.

[80] See id at 539-41 (Marshall dissenting).

[81] Id at 541.

dustry against the minority group whose members will benefit. Further, the program must be narrowly tailored to advantage only those who actually suffered the discrimination. Proving that the government routinely and deliberately discriminated against certain people is extremely difficult. Designing a preference program that targets only those who suffered may be impossible.

II. Intermediate Scrutiny After *Croson*

The Court's opinion in *Croson* was its most decisive concerning affirmative action in a decade, yet this unflinching boldness simultaneously concerned commentators and confused lower courts.[82] Several courts have interpreted *Croson* to require strict scrutiny for the review of any affirmative action program, regardless of the beneficiary.[83] Others continue to use the intermediate standard to review gender-based classifications.[84] In *Contractors Ass'n of Eastern Pa., Inc. v City of Philadelphia*,[85] the Eastern District of Pennsylvania thoughtfully considered whether to apply strict or intermediate scrutiny to a gender-based preference program. A review of that opinion provides an introduction to the dispute. There the court addressed a city ordinance that set aside a percentage of city contracts for minority- and female-owned businesses.[86] Among the stated reasons for the legislation was "[a] pattern of past and present racial, sexual and economic discrimination" in Philadelphia's municipal contracting system.[87] The court cited *Croson* and properly applied strict scrutiny to the provisions that favored minority-owned businesses.[88]

The district court then noted that the Supreme Court has long established that intermediate scrutiny is appropriate for all gender classifications, whether invidious or benign, and it applied interme-

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[82] Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson, 98 Yale L J 1711 (1989).

[83] See *Conlin v Blanchard*, 890 F2d 811, 816 (6th Cir 1989); *Cone Corp. v Hillsborough County*, 908 F2d 908, 913-17 (11th Cir 1990); *American Subcontractors Ass'n v City of Atlanta*, 259 Ga 14, 16, 376 SE2d 662, 664 (1989).

[84] See *Lamprecht v FCC*, 958 F2d 382, 398 n 9 (DC Cir 1992); *Coral Construction Co. v King County*, 941 F2d 910, 930-31 (9th Cir 1991); *Clark v Arizona Interscholastic Ass'n*, 886 F2d 1191, 1193-94 (9th Cir 1989); *Contractors Ass'n of Eastern Pa., Inc. v City of Philadelphia*, 735 F Supp 1274, 1301-07 (E D Pa 1990). See also *Michigan Road Builders Ass'n, Inc. v Milliken*, 834 F2d 583, 595 (6th Cir 1987), aff'd mem, 489 US 1061 (1989) (decided before *Croson*, but affirmed by the Supreme Court after *Croson*).

[85] 735 F Supp 1274 (E D Pa 1990).

[86] Id at 1278.

[87] Id.

[88] Id at 1294-99.

diate scrutiny to the provisions advantaging female-owned businesses.[89] For support, the court cited *Michigan Road Builders Ass'n, Inc. v Milliken*,[90] which applied intermediate scrutiny to a Michigan law favoring female-owned businesses.[91]

In reaching its decision, the *Contractors Ass'n* court reviewed the issues involved in the choice between strict and intermediate scrutiny for gender-based preference programs. First, it suggested that *Croson* may signal a grave skepticism of all affirmative action, a conclusion that would require all classifications for preference programs to receive strict scrutiny.[92] Second, the court briefly noted Justice Stevens's concern that the legislative system should not be used to punish the past conduct of private citizens, since that was the province of the judiciary.[93]

Finally, the use of intermediate scrutiny for gender classifications and strict scrutiny for racial classifications may create an anomalous result in the context of affirmative action. It would become easier to enact a program that advantages women than one that aids racial minorities. This would seem contrary to the structure of the three-tiered system of equal protection review. The graduated standards usually accord minorities greater protection by making it more difficult to enact racial rather than gender classifications.[94]

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[89] Id at 1299-1307.

[90] 834 F2d 583 (6th Cir 1987), aff'd mem, 489 US 1061 (1989) (decided before *Croson*, but affirmed after *Croson*).

[91] 735 F Supp at 1301.

[92] Id at 1303. The court also noted that the three-tiered system itself was problematic and is frequently disparaged by both justices and commentators. Id. The observation is a valid one, but because the three-tiered structure remains the law, its validity is outside the scope of this comment.

[93] Id at 1302, citing *Croson*, 488 US at 513-14 (Stevens concurring). Justice Stevens has carved out his own position concerning equal protection analysis, one that essentially applies a single standard of review. See *Craig v Boren*, 429 US 190, 211-12 (1976) (Stevens concurring). The court in *Contractors Ass'n* noted that Justice Stevens's anxieties about the proper role of the remedial power of the legislative system are "even more pronounced where the level of review of that power is the lesser standard of intermediate scrutiny." 735 F Supp at 1302. Although circumspection may be justified whenever a legislative body attempts to redress discrimination by penalizing another group, the fact that the judicial system uses intermediate rather than strict scrutiny to review that attempt does not indicate that there is a greater danger of legislative abuse; rather, it is evidence that the judicial system has long believed that the legislative action taken—a gender rather than a racial classification—is less dangerous than the action reviewed in *Croson*. Stevens's concerns are mitigated and not enhanced when the subject is gender. Intermediate scrutiny does not make abuse more likely; it recalibrates what the judicial system will consider abuse.

[94] *Contractor's Ass'n*, 735 F Supp at 1302-03.

Part A of this Section addresses the choice between intermediate and strict scrutiny and asserts that invoking strict scrutiny for gender-based programs is both unprecedented and inconsistent with the reasoning in *Croson*. Subsection 1 argues that the Court has replaced a conception of the Fourteenth Amendment as providing for the equal protection of rights inseparable from class with a guarantee of individual rights dissociated from a collective context. The Court's demand for philosophical consistency concerning individual rights requires the application of one standard to judge each type of classification. Intermediate scrutiny is therefore appropriate for all gender classifications, whether invidious or benign.

Subsection 2 notes that this reevaluation allays concerns about the apparently anomalous result of the greater ease of sustaining gender- rather than race-specific programs. The result is only anomalous if the protected rights are seen as collective rather than individual. The anomalous result problem is essentially viewpoint-based; it disappears under the individual conception of equal rights. Subsection 3 reexamines the Brennan-Marshall position. It argues that any departure from intermediate scrutiny in the review of gender-based affirmative action programs should be toward a less exacting standard—minimal scrutiny—and certainly never strict scrutiny. Subsection 4 considers statutes that make both gender and racial classifications. Some courts have applied strict scrutiny, without distinguishing between provisions that make different classifications. That approach is improper. Intermediate scrutiny should be invoked to review the parts of the statute that make gender classifications; strict scrutiny for those provisions that make racial classifications. Finally, subsection 5 argues that where Congress rather than local government enacts a gender-based affirmative action program, a more lenient review is appropriate.

The court in *Contractors Ass'n* went on to discuss the exacting factual predicate that *Croson* established and its potential application to intermediate scrutiny. It concluded that the *Croson*-style factual predicate was applicable to the intermediate standard.[95] Part B examines this approach and argues that transposing a *Croson*-style factual predicate is both improper and misguided because it disingenuously transforms the intermediate standard

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[95] See id at 1304.

into strict scrutiny, a standard the Court has never applied to a gender classification.

A. The Choice Between Intermediate and Strict Scrutiny

1. The consistent treatment of individual rights.

The emphasis on individual rather than collective rights reconfirms the Court's earlier decisions in the area of gender-specific affirmative action programs.[96] Men and women enjoy rights predicated on their status as individuals rather than their gender. The protection of individual rights demands consistent treatment regardless of the purpose of the legislation or the privileged position of the group disadvantaged by the classification.[97] Courts must therefore judge all gender classifications using a single standard—intermediate scrutiny. The alternative, applying strict scrutiny to remedial gender classifications and intermediate scrutiny to other gender classifications, arrantly violates the individual rights conception of the Equal Protection Clause.

The *Contractors Ass'n* court believed that unless the application of strict scrutiny to gender classifications represents repeated instances of careless jurisprudence, it must be premised upon the belief that *Croson* sent "a powerful message that affirmative action and quotas are highly suspect."[98] If the Supreme Court has developed a grave skepticism toward affirmative action, the argument continues, then strict scrutiny is the better standard of review regardless of the nature of the classification.

This position misinterprets both the reasoning behind recent Court decisions and the philosophy that historically informed equal protection review and engendered the three-tiered approach. Although it is true that the conservative majority on the current Court is less willing to advance the cause of affirmative action, the Court applied strict scrutiny to a race-based affirmative action program in *Croson* because it had developed a conception of the Equal Protection Clause premised on the guarantee of individual and not

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[96] See text accompanying notes 17-19. Compare *Croson*, 488 US at 493-94 (applying conception of Fourteenth Amendment rights as individual rights to race-based affirmative action) with *Orr v Orr*, 440 US 268, 279-82 (1979) (individualized hearings required to determine whether spouse is "needy" under alimony statute only because hearing system already established for other purposes); *Califano v Webster*, 430 US 313, 317-18 (1977) (general societal disparity between earnings by men and earnings by women sufficient to support Social Security Act provision granting women higher retirement benefits).

[97] See Section I.C.1.

[98] *Contractors Ass'n*, 735 F Supp at 1303.

collective rights.[99] Justice O'Connor expressly agreed with the view of Justice Powell in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[100]

The same reasoning must apply to gender classifications. If a gender distinction is made, a single standard must be invoked regardless of the advantaged group. The intermediate standard remains proper. Nothing in *Croson* suggests that the Court intended to dismantle the intermediate standard of equal protection review—a view implicit in any decision to invoke strict scrutiny for gender classifications. As the Eastern District of Pennsylvania noted, "[t]he *Croson* opinion gives no indication that the strict scrutiny analysis applied to remedial race- and ethnicity-based classifications was intended to be applied to other remedial forms of classification."[101]

If this were intended, gender classifications would require a uniquely inconsistent approach, one that demanded strict scrutiny for gender classifications used to support preference programs and intermediate scrutiny to review all other gender classifications. This is a particularly incoherent position because it makes invidious gender classifications easier to enact than benign gender classifications. The alternative, that the Court in *Croson* intended to destroy intermediate scrutiny and review all classifications under the strict standard, is indefensible: intermediate scrutiny is never mentioned in the decision. That several justices once expressed distrust of intermediate scrutiny when the Court first expounded the standard reveals an initial discomfort with the expansion of the tiered structure of equal protection review rather than a specific criticism of the intermediate standard.[102] There is depth to its entrenchment: courts have consistently reapplied the intermediate standard in the nearly two decades since its inception.[103]

Croson's siren is not that affirmative action programs are no longer acceptable, but that philosophical consistency concerning individual rights is fundamental to equal protection. The opinion reaffirms and does not dismantle intermediate scrutiny.

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[99] See Section I.C.1.

[100] *Croson*, 488 US at 494, quoting *Bakke*, 438 US at 289-90.

[101] *Contractors Ass'n*, 735 F Supp at 1300.

[102] See note 21.

[103] *Califano*, 430 US at 316-17; *Michael M. v Sonoma County Superior Court*, 450 US 464, 468-69 (1981); *Schlesinger v Ballard*, 419 US 498, 506-10 (1975).

2. The anomalous result problem.

If a court applies intermediate scrutiny to gender-based affirmative action programs and strict scrutiny to race-specific preference programs, it becomes easier to enact affirmative action programs beneficial to women than to enact similar legislation for minorities. This result only appears anomalous if the Fourteenth Amendment guarantees class and not individual rights. If the Equal Protection Clause protects collective rights, then the differing standards are meant to grant varying protection to groups according to their own inability to protect themselves. Consequently, it seems strange that it should be easier to aid women than racial minority groups because the latter warrants greater protection against invidious classifications through strict scrutiny.

This view of the rights guaranteed by the Fourteenth Amendment is inconsonant with the Court's prevailing conception of the Equal Protection Clause.[104] The distinction between strict and intermediate scrutiny does not mean that minorities warrant more protection than women, but that a race-based classification itself is more dangerous. The three-tiered system does not imply that women need less protection than minority groups, but that gender classifications are more likely to serve a beneficial purpose, and are less likely to endanger constitutional rights.

Members of different races share biological features that give them inherently equal capabilities, so a classification that grants preference to one group over another must be arbitrary. The Court noted that "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."[105] Strict scrutiny provides this protection.

Gender classifications are less suspect because legitimate biological differences exist between men and women that may warrant different treatment under law.[106] It is not anomalous to allow a government entity to legislate concerning gender because undenia-

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[104] See Section I.C.1.

[105] *Croson*, 488 US at 505, quoting *Fullilove v Klutznick*, 448 US 448, 533-35 (1980) (Stevens dissenting).

[106] Feminist theorists have spent much of the past two decades debating this position. Recently, relational theorists, notably Carol Gilligan, have argued that men and women differ both biologically and in their moral referents. See generally, Carol Gilligan, *In a Different Voice* (Harvard, 1987).

ble differences between men and women may more frequently justify disparate treatment. The three-tiered system balances the nature of the distinction and the treatment accorded those on either side of the classification. Any perceived facial anomaly resulting from the stronger status of gender rather than racial preference programs is the result of a class-based conception of the Equal Protection Clause—a conception the Court rejects.

3. The significance of the Brennan-Marshall position on gender classifications.

Justices Brennan and Marshall have long supported the use of a less stringent standard of review for benign classifications.[107] Their position is founded on the belief that the equal protection of individual rights dissociated from the collective context is an abstract and unrealistic theory. They would review such a classification under intermediate and not strict scrutiny.

If the Equal Protection Clause protects collective rights, the risks posed by a classification that aids a disadvantaged group are not problematic. A classification that aids a member of a disadvantaged group at the expense of an individual from a generally privileged group promotes, rather than damages, equal rights. If the Brennan-Marshall position is correct, gender classifications for preference programs should be subject to minimal rather than intermediate scrutiny—and certainly never strict scrutiny—because they are benign.[108] If the Fourteenth Amendment guarantees individual rights, however, Justice Brennan's view is unwarranted. Under the individual rights conception there are no benign classifications—they all offend equal protection.

Ironically, with the individual rights perspective ascendant, the Brennan-Marshall position has undermined the justification for the intermediate scrutiny standard. The Court developed the intermediate standard exclusively for gender classifications, and it was appropriate for all gender classifications, regardless of purpose. By invoking intermediate scrutiny for classifications other than gender, Justices Brennan and Marshall engendered the argument

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[107] *Croson*, 488 US at 535-36 (Marshall dissenting); *Wygant v Jackson Board of Education*, 476 US 267, 301-02 (1986) (Marshall dissenting); *University of California Regents v Bakke*, 438 US 265, 359 (1978) (Brennan, White, Marshall, and Blackmun concurring in the judgment in part and dissenting in part); *Fullilove*, 448 US at 517-19 (Marshall concurring in the judgment).

[108] See *Bakke*, 438 US at 358-59 (Brennan, White, Marshall, and Blackmun concurring in the judgment in part and dissenting in part).

that the standards are inherently fungible, and that the purpose of the legislation was relevant. That view allowed judges who were disinclined to accept affirmative action to disregard the well-settled rule that intermediate scrutiny was appropriate for all gender classifications, strict scrutiny for all racial classifications. But the substitution of a conception of individual rights for a conception of class rights does not imply that gender classifications deserve strict scrutiny. It means that a classification, whether benign or invidious, should be subject to the same standard.

Even if the individual rights conception were not ascendant, the result would not be anomalous. Justice O'Connor noted that while affirmative action programs are usually enacted by a dominant group to its own disadvantage, that was not the case in Richmond, where five of the nine city council members and half of the city population was black.[109] While many large cities with significant minority populations have black mayors and council members, women have been less successful in achieving representation. It is not anomalous, then, to make gender-based programs easier to sustain than race-specific ones.

4. Statutes that make both gender and racial classifications.

Statutes that create both race- and gender-based preference programs have confused several courts. These courts have applied strict scrutiny to the entire statute without distinguishing between the different provisions.[110] The correct approach, and one apparently endorsed by the Supreme Court, is to apply strict scrutiny to the racial provisions and intermediate scrutiny to the gender classifications.

In *American Subcontractors Ass'n v City of Atlanta*,[111] the Supreme Court of Georgia used strict scrutiny to invalidate a municipal program favoring both female- and minority-owned businesses. The Georgia court did not distinguish between the part of the statute that made a gender classification and that which adopted a racial preference.[112] Similarly, in *Conlin v Blanchard*,[113] the court cited the strict standard of review and factual predicate

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[109] *Croson*, 488 US at 495.

[110] See *American Subcontractors Ass'n v City of Atlanta*, 259 Ga 14, 16, 376 SE2d 662, 664 (1989); *Conlin v Blanchard*, 890 F2d 811, 816 (6th Cir 1989); *Barhold v Rodriguez* 863 F2d 233, 236-38 (2d Cir 1988).

[111] 376 SE2d at 664-67.

[112] Id. The Second Circuit in *Barhold v Rodriguez* also failed to make this distinction. 863 F2d at 238.

[113] 890 F2d 811, 816 (6th Cir 1989).

expounded in *Wygant* as the threshold that must be met "[i]n order for a race or sex based remedial measure to withstand scrutiny under the fourteenth amendment." The court in *Conlin* failed to justify its apparent adoption of strict scrutiny for gender-based preferences.[114]

To utilize a single standard to review a statute that makes classifications by both gender and race, rather than applying strict scrutiny to racial classifications and intermediate scrutiny to gender classifications, is to find guilt by association. The three-tiered system of equal protection review was developed to provide a more flexible approach to reviewing classifications that demanded dissimilar treatment. The fact that one statute makes two classifications should not pervert equal protection doctrine. Courts should invoke both the intermediate and strict standards to review the respective provisions that classify according to gender and race.

In *Michigan Road Builders Ass'n, Inc. v Milliken*,[115] the Sixth Circuit did just that. The Supreme Court summarily affirmed the Sixth Circuit's decision,[116] implicitly endorsing the application of both intermediate and strict scrutiny to remedial statutes that make both gender and racial classifications.

5. The distinction between congressional and local affirmative action programs.

If Congress rather than local government enacts a gender-based preference program, then the argument for intermediate scrutiny is even more compelling. In *Metro Broadcasting v FCC*,[117] the Court applied intermediate scrutiny to a federal race-specific remedial classification. If Congress were to enact a gender-based affirmative action program, the *Metro Broadcasting* approach would require a court to apply the rational basis test, rather than intermediate scrutiny. The least appropriate approach would be to apply strict scrutiny to a federal gender-based affirmative action program.

After the triumph of the individual rights conception of the Equal Protection Clause, and the subsequent resignation of Justice Brennan, however, it seems unlikely that the *Metro Broadcasting*

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[114] Id at 816-17.

[115] 834 F2d 583 (6th Cir 1987), aff'd mem, 489 US 1061 (1989) (decided before *Croson*, but affirmed after *Croson*).

[116] 489 US 1061 (1989). Ironically, the Sixth Circuit may have subsequently abandoned the intermediate standard in *Conlin*, 890 F2d at 816.

[117] 110 S Ct 2997, 3008-09 (1990).

approach will survive long.[118] The Court will probably subject all classifications to the same standard of review. The deference toward congressional programs will continue, but it will take the form of a less critical review of the factual showing provided by Congress. A court would invoke intermediate scrutiny for a gender classification, strict scrutiny for a racial classification, but defer, without skeptical reappraisal, to congressional findings of fact.

B. Strict Scrutiny By Any Other Name: A *Croson*-Style Factual Requirement Is Inappropriate for Intermediate Scrutiny

As the previous Section demonstrates, intermediate scrutiny remains the proper standard of review for gender-based classifications. Unfortunately, courts have used the standard imprecisely. Some courts have nominally applied intermediate scrutiny but appended a *Croson*-style factual requirement.[119] This approach is misguided. The distinction between a "compelling" governmental interest and an "important" one is not factual, but theoretical. Coupling a *Croson*-style factual requirement with intermediate scrutiny disingenuously transforms it into strict scrutiny.

Croson reiterated that to survive strict scrutiny, a party must demonstrate specific instances of past discrimination by the governmental agency.[120] The opinion did not revise the factual predicate required to justify gender-based affirmative action programs. Nowhere in the opinion does the Court make a broad statement concerning factual requirements for all affirmative action programs.

In *Contractors Ass'n*, the district court tried to balance an exacting requirement for specific evidence that it incorrectly believed *Croson* demanded for all affirmative action programs with the more lenient standard of intermediate scrutiny that it rightly decided to apply.[121] The court wrote that "the philosophy embraced by the *Croson* Court strongly suggests that the Supreme Court's view is that *any* remedial classification, not simply race- or ethnic-

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[118] See text accompanying notes 47-51.

[119] See, for example, *Contractors Ass'n*, 735 F Supp at 1301-07.

[120] See text accompanying notes 65-74.

[121] *Contractors Ass'n*, 735 F Supp at 1303 ("Although in *Croson* this requirement [of specific evidence] was expressed as the 'compelling state interest' prong of the strict scrutiny standard used to evaluate an MBE, this court feels the specific evidence requirement cannot be ignored even in the evaluation of an FBE [Female-Owned Business Enterprise] . . . .").

ity-based, must be tied to specific discrimination by the acting governmental entity."[122]

The opinion in *Contractors Ass'n* inevitably revealed the impropriety of appending a stringent factual predicate to intermediate scrutiny. The court noted that the "evidentiary burden will be greater or lesser depending on the level of scrutiny applied,"[123] but it did not explain how to accord a practicable graduation to specific evidence of governmental discrimination. The court candidly acknowledged that "the result of bearing in mind the need for specific evidence while conducting examinations of the FBE under the intermediate scrutiny test . . . is that the analysis begins to take on the appearance of strict scrutiny."[124]

Without resolving these concerns, the court in *Contractors Ass'n* looked to the legislative history of the Philadelphia set-aside ordinance and dismissed as mere "scattershot numbers" the evidence that despite the presence of 4,365 women business owners in Philadelphia, less than one-half of one percent of all city contracts went to woman-owned businesses.[125] These statistics were "not a substitute for evidence of discrimination against women."[126] What the court wanted was legislative findings specifying the discriminatory practices of the Philadelphia contract procurement process.[127] Finding none, it abrogated the affirmative action program.[128] Although the court said it did not require "glaring evidence" of specific discrimination, it obviously wanted enough to make it squint.[129]

The District of Columbia Circuit, with Justice Thomas returning to decide a case in which he had heard oral arguments, made a similar error. In *Lamprecht v FCC*,[130] the appellate court applied intermediate scrutiny to a congressionally-approved remedial gender classification, and struck it down. Justice Thomas correctly required that evidence of past discrimination be founded on something other than sexual stereotypes.[131] But he improperly required much more. He skeptically reviewed congress-

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[122] Id at 1304.
[123] Id.
[124] Id at 1303.
[125] Id at 1305.
[126] Id.
[127] Id.
[128] Id.
[129] Id.
[130] 958 F2d 382, 391-98 (DC Cir 1992).
[131] Id at 392-95. See also Section I.A.2.

ionally-approved evidentiary studies that demonstrated that women were the victims of discrimination in broadcast licensing, and he questioned Congress's judgment that favoring women would further its stated goal of diversity in the broadcast industry.[132] In demanding a stringent factual showing of past discrimination, which he called "meaningful" evidence,[133] Justice Thomas not only effectively applied strict scrutiny to a gender classification, but he ignored *Fullilove* and *Metro Broadcasting*, which required great deference to congressional findings of fact. *Croson* explicitly endorsed judicial deference to congressional findings and assumptions. Justice O'Connor wrote that Congress "need not make specific findings of discrimination to engage in race-conscious relief."[134] When Congress rather than a local government enacts a gender-based affirmative action program, courts must accept a more lenient factual predicate.

Coupling a strict factual predicate with intermediate scrutiny ignores precedent. The Supreme Court has consistently required a less demanding factual predicate to justify gender-based programs. As long as the classification does not depend on sexual stereotypes, redressing the effects of past discrimination qualifies as an important government interest.[135] To satisfy strict scrutiny, in contrast, a classification must be narrowly tailored to redress the victims of a specific past wrong by the government.[136]

Although the factual predicate for intermediate scrutiny is not closely defined, the Court has established a distinction between the factual requirements of intermediate and strict scrutiny. In *Califano v Webster*, the Court upheld a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing social security retirement benefits, although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history.[137] Noting that women "have been unfairly hindered from earning as much as men," the Court concluded that the statute "works directly to remedy some part of the effect of past discrimination."[138] The past discrimination was not attributed to an identifiable governmental actor, nor was the statute limited to those

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[132] Id at 395-96.
[133] Id at 398.
[134] *Croson*, 488 US at 489.
[135] See Section I.A.2.
[136] See text accompanying notes 75-81.
[137] 430 US 313, 314-21 (1977).
[138] Id at 318.

women who could prove that they had been individual victims of discrimination.[139]

Strict scrutiny would have required a showing that every employer in the country systematically discriminated against women in terms of hiring or salaries. Had the statute at issue in *Califano* been one that granted a similar race-specific preference, evidence that blacks earned lower retirement benefits than whites would not have constituted the factual predicate necessary under strict scrutiny. The Court would have questioned whether some blacks chose to work in lower paying jobs for reasons such as long-term security or job satisfaction.[140] The statute would benefit many black workers who were not the victims of discrimination, and it could not be said to work "directly to compensate [blacks] for past economic discrimination."[141]

Similarly, in *Schlesinger v Ballard*,[142] the Court upheld a federal statute that granted female naval officers a preferential tenure program. The statute allowed female officers a thirteen year tenure of commissioned service before mandatory discharge, but accorded male officers only a nine year tenure. Women were denied combat duty—an area that has historically afforded opportunities for promotion—and therefore had fewer opportunities for promotion than their male counterparts.[143] No specific evidence of discrimination existed, nor was any required. The Court recognized circumstances that could lead to fewer opportunities for women, noted that this was one factor to blame for the relative paucity of higher-ranking female officers, and decided that the statute served an important government interest.[144] Had the *Schlesinger* Court employed a *Croson*-style requirement of evidence, it would have noted that in an era of peace, no naval officers would have combat duty. Thus, female officers, though not the victims of discrimination, would directly benefit from the gender classification.

Some courts believe that *Mississippi University for Women v Hogan*[145] stiffened the factual predicate necessary to sustain a gender classification.[146] They are incorrect. Although the Court in *Ho-*

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[139] Id at 314-21.

[140] In *Croson*, Justice O'Connor noted that blacks may be attracted disproportionately to other jobs unrelated to construction. 488 US at 503.

[141] *Califano*, 430 US at 318.

[142] 419 US 498, 505-10 (1975).

[143] Id at 508.

[144] Id at 508-10.

[145] 458 US 718 (1982).

[146] See, for example, *Contractors Ass'n* 735 F Supp at 1300-01.

gan demanded that a gender classification have an "exceedingly persuasive justification,"[147] it did not require a specific showing of past discrimination by the acting institution. The *Hogan* Court still required that the law be substantially related to an important government objective.[148] Further, the Court discussed and reaffirmed its opinions in *Califano* and *Schlesinger*—decisions that sustained gender-specific preference programs without requiring proof of specific instances of past discrimination.[149] Those cases are easily distinguishable from the facts in *Hogan*, the Court wrote, for in *Califano* women had a history of lower-paying jobs because of their gender, and in *Schlesinger* women were barred from combat duty because of their gender.[150] In *Hogan*, women did not lose opportunities in nursing because of their gender, so the policy did not compensate for discrimination against women.[151] Had men dominated the nursing profession—the kind of disproportionate representation that exists, for example, in the construction industry against minorities—the Court would have upheld the university's admissions policy without demanding a showing that the university itself participated in specific instances of past discrimination. *Hogan* did not tighten the factual requirements of the intermediate standard.

The Court, then, has created an unmistakably less demanding factual requirement for intermediate review, and lower courts should not obfuscate the distinction. The courts in *Contractors Ass'n* and *Lamprecht* ignored that distinction, and improperly perceived a difference between the Supreme Court's adoption of strict scrutiny and its use of a strict factual predicate. There is none.

The Court created intermediate scrutiny to review the distinct issues and problems that arise in gender classifications. It is a loosely-defined standard, inconsistent with the carefully delineated evidentiary requirements for strict scrutiny. As the Eastern District of Pennsylvania acknowledged, the three-tiered system of equal protection review is best described as a "continuum [that] provides the court with 'buzz words' (i.e. 'compelling state interest,' 'important governmental interest' and 'rational basis') that in

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[147] 458 US at 724, citing *Kirchberg v Feenstra*, 450 US 455, 461 (1981).

[148] Id at 725.

[149] Id at 728-29.

[150] Id.

[151] Id at 729-30.

practice are at times both difficult to distinguish and to apply."[152] A court, in deciding whether a gender classification survives intermediate scrutiny, is explicitly or implicitly deciding what amount of factual evidence is necessary for a finding that a governmental objective is important. The factual predicate required cannot be equal to that needed to support a racial classification—if it were, there would be no reason for an intermediate standard of review. When a court applies intermediate scrutiny but requires *Croson*-style factual support, it is essentially applying strict scrutiny. Such a judicial feint is inconsonant with the purpose of the three-tiered system of equal protection review.

CONCLUSION

The Court's reevaluation of race-specific preference programs reflects an emphasis on the consistent protection of individual rights. This perspective requires strict scrutiny for all racial classifications, regardless of purpose. Similarly, it requires intermediate scrutiny for all gender classifications. *Croson* addressed only race-specific affirmative action programs; strict scrutiny has never been appropriate for the review of gender classifications. The Court has been more willing to tolerate gender classifications than racial classifications, and the intermediate standard is rooted in that predisposition.

Intermediate scrutiny remains appropriate for gender-based affirmative action programs, but intermediate scrutiny must remain intermediate. Appending a *Croson*-style factual predicate to the standard disingenuously transforms it into strict scrutiny. Where Congress rather than local government enacts the gender preference, an even more lenient review of the factual predicate is appropriate. If the Court desires an unsparing factual predicate for intermediate scrutiny, it will add one. As long as it remains silent, lower courts must continue to apply the intermediate scrutiny standard as the Court has consistently formulated it.

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[152] *Contractors Ass'n*, 735 F Supp at 1303.